Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

VICTOR DeSORDI, JR.,
Petitioner,

v.

JOHN BURGE, Superintendent,
Auburn Correctional Facility,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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Question Presented For Review

Was the Petitioner deprived of his Constitutional guarantees under the Fifth and Fourteenth Amendments of the United States Constitution in that he failed to receive a fair trial by an unbiased and impartial judge due to a relationship the judge and his family had with the two victims and their family?

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STATEMENT OF BASIS FOR JURISDICTION

Petitioner Victor DeSordi, Jr., hereinafter Petitioner, respectfully petitions for a Writ of Certiorari pursuant to Supreme Court Rule 10 from a Summary Order for denial of a petition for habeas corpus from the United States Court of Appeals for the Second Circuit dated January 12, 2004. The Summary Order affirmed the judgment of the United States District Court for the Northern District of New York, dated July 30, 2002.

Petitioner appeals his conviction and sentence for Depraved Indifference Murder pursuant to New York Penal Law § 125.25(2), and Assault in the First Degree pursuant to New York Penal Law § 120.10. Petitioner asserts that he was deprived of his Constitutional guarantees under the Fifth and Fourteenth Amendments of the United States Constitution in that he failed to receive a fair trial by an unbiased and impartial judge due to a relationship the judge and his family had with the two victims and their family

In denying Petitioner's application for a writ of Habeas Corpus the Summary Order from the United States Court of Appeals for the Second Circuit, held that "Petitioner failed to properly show he did not receive a trial 'by an unbiased and impartial judge without a direct personal interest in the outcome of the hearing.'" Ungar v. Sarafite, 376 U.S. 575, 584 (1964). The Summary Order seems to disregard the substance of this Court's decisions in Liteky v. United States, 114 S.Ct. 1147 (1994); and In re Murchison, 75 S.Ct. 623 (1955).

Petitioner respectfully submits that granting this petition for a Writ of Certiorari is necessary to secure and maintain uniformity in the decisions of the various Circuits of the United States Court of Appeals with respect to this Court's decisions regarding recusal at criminal trials for judicial bias. Petitioner directs the Court's attention to the issue concerned with this petition and respectfully submits that the Summary Order of the United States Court of

Appeals for the Second Circuit is in conflict with relevant decisions of this Court and touches upon an important federal question pursuant to Supreme Court Rule 12(c), which is in need of resolve.

Petitioner respectfully submits that the Summary Order of the United States Court of Appeals for the Second Circuit incorrectly applied this Court's standard for recusal of a trial judge for reason of bias.

PROCEDURAL BACKGROUND

Petitioner-Appellant, hereinafter, referred to as "Petitioner," was convicted of Murder in the Second Degree and Assault in the First Degree in New York State. He initially appealed to the New York State Supreme Court, Third Judicial Department and his conviction was affirmed. People v. DeSordi, 238 A.D.2d 738 (3rd Dept 1997). Leave to appeal to the New York State Court of Appeals was denied. People v. DeSordi, 90 N.Y.2d 904 (1997). Petitioner filed a motion for Coram Nobis in the New York State Supreme Court, Third Judicial Department for ineffective assistance of appellate counsel. Said motion was denied without opinion on March 16, 1999. Petitioner then brought a Habeas Corpus petition in the United States District Court for the Northern District of New York pursuant to 28 U.S.C. 2254. Magistrate Gary L. Sharpe denied the petition in a "REPORT-RECOMMENDATION" dated March 7, 2002. Pursuant to 28 U.S.C. Section 636 [b][1] and local rule 72.1 [c], Petitioner filed his objections to the REPORT-RECOMMENDATION with the District Court. On July 30, 2002, Judge Lawrence E. Kahn APPROVED and ADOPTED Magistrate Sharpe's REPORT-RECOMMENDATION in its entirety and further denied and dismissed the Petitioner's Habeas Corpus petition.

A Certificate of Appealability to the United States Court of Appeals, Second Circuit, was GRANTED in PART on September 26, 2002 pursuant to 28 U.S.C. 2253 on the issues of: (i) whether the state court wrongfully denied Petitioner's recusal motion as untimely and (ii) whether prosecutorial misconduct during the summation at petitioner's criminal trial violated his right to due process (A-125). The United States Court of Appeals, Second Circuit, affirmed the District Court's determination on January 12, 2004.

ARGUMENT

PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL GUARANTEES UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION IN THAT HE FAILED TO RECEIVE A FAIR TRIAL BY AN UNBIASED AND IMPARTIAL JUDGE DUE TO A RELATIONSHIP THE JUDGE AND HIS FAMILY HAD WITH THE TWO VICTIMS AND THEIR FAMILY.

Statement of Facts:

The trial Judge assigned to handle Petitioner's murder and assault case raised the subject of recusing himself on January 4, 1995 early in the proceedings. He raised this subject during an off the record conference held outside of petitioner's presence because of a relationship that he and his children enjoyed with the victims' and their family (A-27). By raising this issue, the Judge apparently believed that this relationship would create at least the appearance of bias and/or partiality. At that time defense counsel declined to move to recuse the trial judge.

During the one month which followed this off the record conversation concerning the judge's recusal, the

judge began exhibiting signs of bias against the petitioner and signs of partiality towards the victims' family which caused the defense tremendous concern. Defense counsel then brought a written motion to recuse the Judge on February 7, 1995 citing multiple grounds which occurred both on and off the record. (February 14 at p.9). In moving to recuse, defense counsel cited:

1) The Court's gratuitous opinion in an off the record conference that a grand jury witness' (Miss Gidada's) testimony was false and the defense should seriously consider not calling her to testify at trial. Defense counsel stated that Judge O'Brien had no comparative basis on which to determine whether the witness was telling the truth to the grand jury. Defense counsel suggested that Judge O'Brien "had some extrajudicial knowledge or information about Ms. Gidada's testimony on the incident that the court was using to compare the initial reading of her grand jury testimony to some other version of these events . . . that's obviously, a concern that I have with regard to the Court's ability to fairly and impartially review not only her testimony but the whole circumstances of this incident." (February 14, 1995 at pp 4-5)(Emphasis added)

2) The court's comments in refusing the proposed plea agreement which was agreed upon by the prosecutor and the victims' family. The record also reveals that the Judge was second guessing whether the victims' family really understood the plea agreement even though they had discussed the matter with the District Attorney and had also retained private counsel. The fact that the victims' family spoke with their own attorney and that the trial judge did not know what this attorney said to them is "why the position of the victims here may not, in fact, be so compelling" [Motion argument dated 2-14-95 at p.12]. Additionally, the judge expressed concern as to how the victims' family would view the plea bargain "eight or nine

years down the road". [Defendant's motion to recuse at para 4].

3) Defense counsel raised the fact that the judge discussed an "acquaintanceship which [he] might have with any members of the [victims'] family, of any acquaintanceship which one or more of [his] children might have with either of the victims in this case" [Motion argument dated 2-14-95 at p. 8]. This in conjunction with the trial judge's concern as to the victim's and his family's present understanding of the plea bargain, as well as their future reaction to it, created the appearance that the trial judge was attempting to act as a representative for the victims' family notwithstanding the fact that they had private counsel and had consulted with the District Attorney.

4) Defense counsel cited to the court's sua sponte consideration as to whether the petitioner should be handcuffed or shackled during the course of the trial (Motion to recuse dated February 7, 1994, Exhibit B). Defense counsel argued that there should be a request, or some cause, for such a condition before a court should impose it. Defense counsel contended he knew of no information having been presented to the court which would justify considering such a drastic measure and that the court's consideration of such a drastic measure "raises the unfortunate issue of this Court's appearance of some bias or prejudice against this defendant simply as a result of the charges contained in the indictment".

5) Defense counsel cited to the Judge's desire for a "quick and timely trial", and that the Judge averred to the advantages such a speedy trial would have for the prosecution in terms of recollection and memory of "especially police witnesses." [Defendant's motion to recuse dated 2-7-95 at para 11].

6) Defense counsel requested an oral argument on his motion to recuse and this request was met with much resistance. When defense counsel attempted to make a record of the matters stated in the off the record conference on January 4, where Judge O'Brien's brought up the issue of his own recusal, Judge O'Brien prevented him from making a complete record. [Motion argument dated 2. 1-3, 9.] At the conclusion of the motion argument Judge O'Brien denied the motion to recuse himself, but refused to put his findings of fact and conclusions of law on the record stating he would do so at a later time. [Motion argument dated 2-14-95 at p. 20-21]. The findings of fact and conclusions of law were never placed on the record.

Judge O'Brien continued to exhibit bias during the trial by marshaling the evidence heavily in favor of conviction (CITE FROM RECORD). Petitioner was eventually convicted of Depraved Indifference Murder and Assault in the First Degree. At sentencing, the trial judge made clearly inappropriate remarks regarding the petitioner's exercise of his right to remain silent throughout his trial. The trial judge further evinced extra judicial knowledge about the case by suggesting that Petitioner "could have easily overpowered, in my view, David Eberst if he needed to." [Sent. at 26]. This comment may very well have stemmed from Judge O'Brien's personal knowledge of David Eberst' s strength and abilities. It is no surprise, based on the trial judge's conduct, that Petitioner was given the maximum sentence permitted by law.

To date, none of the details concerning Judge O'Brien's relationship with the victims and their family have been disclosed such as: the frequency the parties saw one another; the date of last contact; and whether the Petitioner's case was ever discussed.

In denying Petitioner's application for a Writ of Habeas Corpus, the United States Court of Appeals for the

Second Circuit held that "Petitioner failed to properly show he did not receive a trial "by an unbiased and impartial judge without a direct personal interest in the outcome of the hearing." Ungar v. Sarafite, 376 U.S. 575, 584 (1964).

Discussion of Law:

The issue at bar is indeed a timely one: when must a judge recuse himself when he or his family have some type of personal relationship with one of the parties? This issue is ripe for review in light of the recent controversy surrounding Vice President Cheney and the Energy Task Force. Unlike the situation involving Mr. Chief Justice Scalia and the Vice President, in this case the judge brought up the subject of disqualifying himself. When defense counsel then moved to recuse the Judge some thirty days later, he refused. Unlike the situation involving Mr. Justice Scalia and the Vice President, this case involves a judge whose impartiality *could reasonably be questioned.* And while Mr. Justice Scalia is quite correct in his statement that "social contacts with high level executive officials have never been thought improper for judges who may have before them cases in which those people are involved in their official capacity, as opposed to their personal capacity," the case at bar differs in that the judge and his family were personal acquaintances with the victim and their families; a relationship that concerned the judge at the outset; and a relationship that raises reasonable questions as to the judge's impartiality.

This Court held in Liteky v. United States, 114 S.Ct. 1147 (1994) that judicial remarks made during the course of a trial, even if critical, hostile or disapproving of parties or their cases, ordinarily do not constitute a basis for bias or partiality requiring disqualification. However, such comments may constitute removal for bias or partiality if those comments reveal an opinion that derives from an extrajudicial source. Liteky at 1155. The case in Liteky,

supra; involved a recusal claim based on the judge's display of "impatience, disregard for the defense and animosity toward" the defendant, co defendants and their beliefs. Liteky at 1151. The judge's disposition toward the defendants in Liteky emanated within the trial itself, not before it began.

The standard in Liteky - the extrajudicial source standard- is troublesome because the standard is one that is virtually impossible for a criminal defendant to meet. Based on the Liteky standard, how can a defendant ever really prove that the bias a judge exhibits during a given stage of criminal proceedings is derived from an extrajudicial source? It is not until that defendant stands before the judge that the judge begins to develop - or at least display - the impropriety and contempt for the defendant that would positively require that judge's recusal.

It would be impossible then, for any defendant - who has no relationship outside of the courtroom with the presiding judge - to prove that a bias was wholly a result of events and circumstances that emanated outside of the proceedings. However, it is precisely the judge's duty - not the duty of any lawyer or defendant - to identify even the mere possibility of impropriety or impartiality and recuse him or herself.

Significantly distinguishable from Liteky - and of material importance here - is the fact that Petitioner's claim for recusal - aside from arising out of the Judge's conduct at trial - arises from *the judge's* relationship to the victims and their family developed long before the crime was committed - not during the course of the trial over which he presided. The trial judge in Petitioner's case knew the victims and their families. The relationship was of such a nature that the trial judge took it upon himself to discuss the matter of his recusal with the parties involved, indicating that he would be inclined to entertain such a motion. One would think the above would be sufficient to meet the extrajudicial source requirement announced in Liteky, however the lower Court

held it was not. It would appear then, that based on the District Court's interpretation of Liteky, and despite the trial judge's own willingness to entertain a motion for recusal, no defendant could ever meet the extrajudicial source standard for judicial recusal.

Mr. Justice Scalia stated, while discussing the "extrajudicial source" doctrine in Liteky, *supra*:

> "[T]rial rulings have a judicial expression rather than a judicial source. They may be well based on extra judicial knowledge or motives." Liteky at 1152. " The judge who presides at trial may ... be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired *in the course of the proceedings*, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task." Id at 1155, 1157. *emphasis added.*

See also Ungar v. Sarafite, 376 U.S. 575, 584 (holding court is unwilling to bottom a constitutional rule of disqualification where party to action refuses to comply with judges orders and judge admonishes him). This case, however, is not a case about an unruly defendant who was routinely admonished on the record by the judge at trial. In this case, what the trial judge knew *before* Petitioner ever set foot in the courtroom is what pierced the veil of impartiality - not what was discovered through the routine processes of trial. It is undeniable that based on the strictures needed to show impartiality from an extrajudicial source, that one may have to refer to what actually takes place during the trial to show the bias necessary for recusal.

In light of what Mr. Justice Scalia identifies as the "pejorative connotation" of the terms "bias" and "prejudice", the case at bar involves the type of "judicial predispositions that go beyond what is normal and acceptable." Id. at 1155-1156. The partiality identified by the judge at bar - of his own volition, without inducement by counsel from either side - was if not "wrongful", at the very least "inappropriate." Moreover, it was arguably developed from an extrajudicial source - the judge's and his family's relationship with the victims and the victims' families. The near impossibility of actually proving bias from an extrajudicial source, absent a personal relationship with the judge outside the trial itself, has forced Petitioner to rely on the judge's actions at trial, in chambers, and on the record. Petitioner respectfully submits it would have been best to err on the side of caution - and the Fifth and Fourteenth amendments - and require recusal of the trial judge.

In addressing the "one man grand jury" system in Michigan, Mr. Justice Black reflected the long settled constitutional requirement of a fair trial before an impartial tribunal. In Re Murchison, 75 S.Ct. 623, 624-625 (1955). "A fair trial in a fair tribunal is a basic requirement of dué process." Id at 625. "Fairness of course requires an absence of actual bias in the trial of cases." Id. "[N]o man is permitted to try cases where he has an interest in the outcome. Id; italics added. Mr. Justice Black went on to add: "That interest cannot be defined with precision. Circumstances and relationships must be considered." Id. Most significantly, the court stated: "Every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear, and true between the State and the accused denies the latter due process." Id. To perform its high function in the best way, justice must satisfy the *appearance* of justice." Id citing Offutt v. United States, 348 U.S. 11, 14; *emphasis added.*

At bar, the "possible temptation" present was the relationship that the trial judge had with the victims and their family. No average person would hold the balance nice, clear, and true between the State and a person accused of murdering one friend/acquaintance and assaulting another. Considering the circumstances and relationships involved here, it is clear that this judge should not have been permitted to try this case. At the very least, "the appearance of justice" is not satisfied.

As was the case in Murchison, *supra*; just as "it is difficult if not impossible for a judge to free himself from the influence of what took place in his grand jury secret session", it is equally difficult if not impossible for a judge to set aside personal feelings developed in the course of a personal - familial - relationship with the victims and the victims' family during the trial against the man standing accused of killing and assaulting those with whom the judge had those personal relationships. However, at bar, the feelings developed - based on the actions of the judge throughout the trial - arguably were developed prior to trial, during the judge's and his family's relationship with the victim and the victims' family. Again, unless the defendant or defense counsel had a personal relationship with the judge outside the trial, it is quite difficult for a defendant to show such a relationship actually caused the prejudice - without looking at the conduct of the judge at trial through the record on appeal. Of course, to do that would necessitate a look at judicial actions that occurred "within the proceeding", and this would allow an easy interpretation of those actions as being not of an extrajudicial source because they developed during the course of trial. Despite the confusion of when the opinions impermissibly developed, from an extrajudicial source or "within the proceeding" one thing is clear - the mere appearance of impropriety is too much for justice to bear. The credibility of our system of justice is severely diminished in the eyes of those who bear witness to such an event - regardless of

whether or not actual prejudice results. Murchison, *supra* at 626-627.

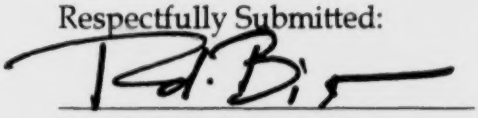
CONCLUSION

Petitioner submits that the standard for recusal under Liteky is vague, and without sufficient clarification as to when a trial judge's actions may be considered in determining the extent the impartiality developed from an extrajudicial source – or "within the proceeding".

Petitioner **also** submits that he is entitled to relief under the Fifth and Fourteenth Amendments of the United States Constitution because the trial judge and his family had a relationship with the victims and their families in the case over which the trial judge presided, the circumstances and relationships of which thereby denied Petitioner a fair trial by an impartial tribunal and due process of law.

Dated: April 9, 2004
Syracuse, New York

Respectfully Submitted:



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APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

VICTOR DESORDI, JR.,

Petitioner,

v. 9:98-CV-1351 (LEK)(GLS)

HANS WALKER, Superintendent, Auburn Corr. Facility,

Respondent.

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GARY L. SHARPE, MAGISTRATE JUDGE

ORDER and REPORT-RECOMMENDATION

I. Background

A-1

Randi Juda Bianco, Esq. filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254 on behalf of petitioner Victor DeSordi, Jr. ("DeSordi") on August 20, 1998 (Dkt. No. 1). The petition was accompanied by a Supporting Memorandum of Law (Dkt. No. 2) ("Supporting Mem.").[1] Then-Magistrate Judge David N. Hurd issued an order pursuant to the rules governing Section 2254 cases in the United States District Courts. 28 U.S.C. foil. § 2254, that directed the Office of the Attorney General for the State of New York ("Attorney General") to file a response (Dkt. No. 3). The Attorney General filed an answer and memorandum of law requesting dismissal of the petition (Dkt. Nos. 14-15). to which DeSordi filed a reply (Dkt. No. 17).

II. Discussion

A. State Court Proceedings

The testimony at trial revealed that during the evening hours of October 7, 1994, and into the early morning hours of October 8, 1994, Peter Ebrest ("Peter") and Richard Havranek ("Havranek") had a drink at Peter's home and then went to a bar in the Cazenovia, New York, area. See Appendix in Support of Appeal ("App.") at PP. A493-94. Peter's brother, David Ebrest ("David"), arrived at the bar and the men had one or two beers. *Id.* at P. A494. They then went to a tavern across the street, where the three men and

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[1] That submission is eighty-three (83) pages in length and is ***clearly excessive,*** and in violation of Local Rule 7.1(c) which provides, in part, that "[n]o party shall file or serve a memorandum of law that exceeds twenty-five (25) pages in length ...." Counsel's future filings with the court in this or other actions are to fully comply with all Federal and Local Rules of Civil Procedure.

two others who had joined them split two pitchers of beer. *Id.* at P. A495. According to Peter, neither he, David nor Havranek were intoxicated. *Id.* at P. A496. They left the tavern and Peter and Havranek went into Havranek's car, while David got into his truck. David soon stopped and got out of his truck, and yelled "[w]hat the hell or what - why are you throwing a rock at my truck." *Id.* at P. A-508.

At that same time, Michael Battlle, who was in his apartment near the alleyway where the incident occurred, heard DeSordi asking "why can't we be friends?" (See Transcript of Trial of Victor DeSordi (4/24/95) ("Tr.") at PP. 860-61). However, DeSordi soon became angry and shouted that he did not throw anything. App. at P. A275. A physical altercation with David ensued near a dumpster, and DeSordi, David and one or two other individuals began fighting. *Id.* at PP. A275, A506-07; Tr. at P. 862.

As the fight was underway. Peter began walking toward his brother. As he approached the dumpster, an individual approached Peter and he felt a blow to his left upper chest. App. at PP. A512, 515. As he was falling to the ground, the man[2] latched onto Peter's neck with his teeth. *Id.* at PP. A516-17. After the assault, the perpetrator ran from the scene and yelled out that he would kill Peter and "eat his sou!." Tr. at P. 862.[3]

Peter ran toward his brother and saw him laying motionless on his back with blood on him. App. at PP. A520-21. Peter attempted to give David cardiopulmonary resuscitation, *Id.* at P. 521, however, he died of a stab wound to his chest. Tr. at PP. 1358-61.

While the police were at the crime scene, DeSordi returned with his mother, aunt and a friend. Tr.atP.941. DeSordi indicated to a police officer that he had been involved in a fight that night and that he wished to speak to somebody. *Id.*

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[2] Peter could not identify DeSordi as the assailant.

[3] DeSordi was seen with blood on his shirt and around his face at this time. App. at P. A280-81.

at P. 942. DeSordi was read and acknowledged his *Miranda*[4] rights, *Id.* at PP. 942-43, and was then driven to the Cazenovia Police Station, where he was once again read his *Miranda* rights. *Id.* at PP. 944-45. DeSordi then gave a written and videotaped statement in which he admitted losing his temper during an altercation. *Id.* at PP. 949-50.[5]

DeSordi was arrested and indicted by a Madison County Grand Jury of the crimes of depraved indifference murder, manslaughter, and criminally negligent homicide with respect to David, and assault with respect to Peter. A jury trial was held over which the Hon. William F. O'Brien, III ("Judge O'Brien") presided. DeSordi was found guilty of murdering David and assaulting Peter. *Id.* at PP. 1586-87.

Judge O'Brien sentenced DeSordi to twenty-five years to life imprisonment on the murder conviction, and a consecutive three to nine years on the assault conviction. Pet. at ^ 4. DeSordi appealed, and the Appellate Division, Third Department ("Appellate Division") affirmed. Peop/e *v. DeSordi,* 238 A.D.2d 738 (3rd Dep't 1997). The Court of Appeals denied DeSordi leave to appeal. *People v. DeSordi,* 90 N.Y.2d 904(1997).

B. Standards of Review

Prior to addressing the merits, the court addresses the standards of review now employed when considering federal habeas petitions.

Enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132. 110 Stat. 1214 (1996). brought about significant new limitations on federal power to grant habeas relief to a state court prisoner under 28 U.S.C. § 2254. Those new standards apply to petitions filed after the Act's effective date even though

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[4] *Miranda v. Arizona,* 384 U.S. 436 (1966).

[5] DeSordi stated, *inter alia,* that individuals "were trying to swing at me. I lost my temper and blacked out. I do own a knife. The knife is stainless steel. There's a lion on the handle." *Id.* at P. 950.

they relate to convictions which predate enactment of the AEDPA. *Williams v. Taylor*, 529 U.S. 362, 402 (2000); *Boyette v. Lefevre*, 246 F.3d 76, 88 (2dCir.2001).

Under the AEDPA, a federal court may not grant habeas relief to a state prisoner on a claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim -

> 1) resulted in a decision that was contrary to, or involved an unreasonable application, of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> 2) resulted in a decision that was based on a unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d); see a/so, *Noble v. Kelly*, 246 F.3d 93, 98 (2d Cir. 2001), *cert. denied*, __ US. __, 122 S. Ct. 197 (2001); *Boyette*, 246 F.3d at 88. The AEDPA also requires that, in federal habeas proceedings, "a determination of a factual issue made by a state court shall be presumed to be correct [and t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); see a/so, *Boyette*, 246 F.3d at 88 *(quoting* § 2254(e)(1)) *(internal quotations omitted).*

The Second Circuit has provided additional guidance concerning application of this test. noting:

> [u]nder AEDPA, we ask three questions to determine whether a federal court may grant habeas relief: 1) Was the principle of Supreme Court case law relied upon in the habeas petition "clearly established" when the state court ruled?; 2) If so. was the state

> court's decision "contrary to" that established Supreme Court precedent?; and, 3) If not, did the state court's decision constitute an "unreasonable application" of that principle?

Williams v. Artuz, 237 F.3d 147, 152 (2d Cir. 2001) *(citing Williams* and Franc/s S. *v. Stone*, 221 F.3d 100, 108-09 (2d Cir. 2000)).

The AEDPA's standards of review only apply to federal claims which have been adjudicated on the merits in the state court. *Washington v. Shriver*, 255 F.3d 45, 52-55 (2d Cir. 2001). In these circumstances, deference is required even though the state court's decision lacks explicit reference to the federal claim or to federal case law. *Sellan v. Kuhlman*, 261 F.3d 303, 311-12 (2d Cir. 2001). As that court explained:

> the plain meaning of § 2254(d)(1) dictates our holding: For the purposes of AEDPA deference, a state court "adjudicate^]" a state prisoner's federal claim on the merits when it (1) disposes of the claim "on the merits," and (2) reduces its disposition to judgment. When a state court does so, a federal habeas court must defer in the manner prescribed by 28 U.S.C. § 2254(d)(1) to the state court's decision on the federal claim - **even *if the state court does not explicitly refer to either the federal claim or to relevant federal case law.***

Sellan, 261 F.3d at 312 *(emphasis added).*

Once the federal court has determined that the state court's decision has been decided "on the merits", the federal court may find that the state court's decision is "contrary to" established Supreme Court precedent only if the state court applied a rule that contradicts Supreme Court precedent, or decided a case differently than the Supreme Court on a set of

materially indistinguishable facts, *Taylor*,, 529 U.S. at 405-06. Finally, in determining whether the decision was an "unreasonable determination" in light of the evidence presented, the federal court is not to determine whether the state court's finding was merely incorrect or erroneous, but instead whether it was "objectively unreasonable". *Id.* at 409; see a/so, *Selian,* 261 F.3d at 315. This inquiry admits of "[s]ome increment of incorrectness beyond error", though "the increment need not be great[.]" *Francis S.*, 221 F.3d at 111.

C. Merits of Petition

DeSordi alleges six Grounds in support of his petition. He argues that: (1) Judge O'Brien wrongfully denied a motion for recusal; (2) Judge O'Brien improperly marshaled the evidence at the conclusion of the trial; (3) the summation given by District Attorney Donald F. Cerio, Jr. ("DA Cerio") deprived DeSordi of a fair trial; (4) the verdict was not supported by sufficient evidence, and was against the weight of the evidence; (5) the sentence imposed on him violated the Double Jeopardy clause of the U.S. Constitution; and, (6) he was denied the effective assistance of appellate counsel. See Pet. and Amended Pet.[6] (Dkt. Nos. 1 and 12).

I. Recusal Motion

Initially, DeSordi claims that the Appellate Division, in affirming Judge O'Brien's denial of the recusal motion, "improperly restricted the time for bringing a motion to recuse a trial judge." Supporting Mem. at P. 29.

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[6] DeSordi's counsel filed an "Amendment to Memoranda [sic] of Law in Support of Petition" in which she asserts ineffective assistance of appellate counsel as the sixth and final Ground for relief (Dkt. No. 12). Counsel is advised that, in the future, a ***complete pleading***, rather than piecemeal submissions, are to be filed in the event counsel wishes to file an amended pleading. *See e.g.*, Local Rule 15.1(a).

Although the Appellate Division commented that the request for recusal "was not promptly acted upon at the outset of the case," *DeSordi*, 238 A.D.2d at 740-41, a careful review of the state court record reveals that Judge O'Brien did not deny the recusal motion because it was untimely. Rather, he considered the application and, after reviewing the submissions in support of the request, stated that he had:

> no relationship here with anybody in this case. I have no bias ... and I think I said to you I felt that I was the single best Judge, in my view, that could be assigned to this case and I'm convinced that I am. And I think my record would support that. Whether you agree with that or not, that might be one of the things that we would disagree on, but I think I'm right on that. I know I'm right on that.

See Hearing before Judge O'Brien (2/14/95) ("February 1995, Hearing") at PP. 9-10. Since the recusal motion was not denied because untimely (see *Id.* at PP. 1-21), DeSordi is not entitled to habeas relief on his claim that the state court unduly restricted the time during which he could make the motion.

DeSordi next argues that Judge O'Brien's denial of the recusal motion was improper because he: (a) commented outside the presence of the jury that he believed a potential defense witness might have testified falsely before the grand jury; (b) refused to accept what DeSordi refers to as a plea agreement; (c) indicated during a pretrial conference that he may have had an acquaintanceship with a member of the victim's family; (d) *sua sponte* raised the issue of whether DeSordi should be restrained during trial; (e) commented that the affirmative defense of justification submitted to the grand jury might not have been legally required; (f) indicated that a "quick and timely" trial would be beneficial

for police witnesses that might testify at trial; (g) denied defense counsel's request for oral argument on the recusal motion; and, (h) showed "hostility toward defense counsel". *See* Supporting Mem. at PP. 36-42.

There does not appear to be any "clearly established" law as to when a recusal motion must be granted. See e.g., *Whitacre v. Davey*, 727 F.Supp. 636. 638 (D.D.C. 1988) ("[t]he right to recusal is not established in any clear body of prior law"), *aff'd*, 890 F.2d 1168 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990). However, "a trial must proceed before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997); *Montgomery v. Artuz*, 26 F.Supp.2d 497, 502 (W.D.N.Y. Oct. 16, 1998). Habeas relief is available where the petitioner establishes that the judge "had a 'direct, personal, substantial, pecuniary interest in reaching [the particular] conclusion against him in his case.'" *Martuzas v. Reynolds*, 983 F.Supp. 87, 91 (N.D.N.Y. 1997) (Pooler, D.J.) (adopting Report-Recommendation of Magistrate Judge David R. Homer) *{citing Tumey v. Ohio*, 273 U.S. 510. 523 (1927)). or exhibited "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994); *In re Int'l Bus. Mach. Corp.*, 45 F.3d 641, 644 (2d Cir. 1995).

Judge O'Brien's comments regarding the grand jury testimony were made outside the presence of the jury and do not demonstrate bias on his part.

Although DeSordi now contends that there was a plea agreement that Judge O'Brien rejected, Supporting Mem. at PP. 37-38, Traverse at P. 6, Judge O'Brien indicated at the time he denied the recusal motion that no such agreement existed, and that the putative agreement was merely a proposal from the prosecutor that DeSordi's counsel had not even discussed with his client (February 1995, Hearing at PP. 13-14). No ***evidence*** has been presented by DeSordi that refutes this statement of Judge O'Brien.

DeSordi has not provided any evidence that contradicts Judge O'Brien's statement that he had "no relationship here with anybody in this case." *Id.* at P. 9. Thus, he has not proven that Judge O'Brien had any personal interest in the outcome of the proceeding.

Although DeSordi claims Judge O'Brien improperly stated that the defense of justification was not supported by the evidence presented to the grand jury, Supporting Mem. at P. 39, subsequent to Judge O'Brien's statement, he indicated that his statement was merely an attempt to alert defense counsel to the fact that such evidence must be presented at trial in order to justify a jury charge on the defense of justification. See Hearing before Judge O'Brien (3/23/95) at PP. 26-27.[7] DeSordi has not offered evidence that contradicts Judge O'Brien's explanation.

As to DeSordi's claim regarding the timing of the trial, the letter upon which this aspect of his claim is based was written by Judge O'Brien to ***DA Cerio.*** *See* Ex. C to Motion to Recuse (2/8/95). The letter was written in response to correspondence from DA Cerio in which he expressed some concern over the fact that the trial would take place "less than five full months" after the crime. Judge O'Brien indicated to DA Cerio that he did not understand why a prosecutor "would complain about a quick and timely trial which has always been considered to be best from a trial standpoint since witnesses' memories and recollections often fade over the passage of time, especially police witnesses." *Id.* The letter does not demonstrate "an overwhelming concern for a timely trial [in order] to ensure that the prosecution's police witnesses had pristine memories of the events in question." Traverse at P. 5. but rather an observation from a Judge that witnesses' memories - including those that would be produced by the author of the

[7] Judge O'Brien subsequently instructed the jury on the law concerning the defense of justification. Tr. at P. 1533-42.

letter that prompted Judge O'Brien's response - would be better served by an earlier trial date.[8]

Additionally, Judge O'Brien sent a letter to the parties advising them of the final pretrial conference relating to the case, and noting that, at that conference, the parties were required to discuss logistics concerning voir dire, and other issues that might arise concerning the trial, including whether DeSordi needed to be restrained during trial. See Letter from Judge O'Brien (1/30/95). The letter set a final pretrial conference to discuss that matter for Friday afternoon on March 3. 1995. *Id.* Although DeSordi claims that the letter indicates bias on the part of Judge O'Brien, since the trial was to commence the next business day after the conference, *Id.*, DeSordi apparently overlooks the fact that trial courts are to hold hearings to determine what. if any, restraints are necessary with respect to criminal defendants. *Davidson v. Riley*, 44 F.3d 1118 (2d Cir. 1995). Thus, the letter was merely Judge O'Brien's manner of advising counsel that such a hearing, if necessary, had to be conducted at the final pretrial conference.

The fact that Judge O'Brien did not desire oral argument as to the recusal motion is no basis upon which this court can find evidence of bias on Judge O'Brien's part.

Additionally, the "evidence" DeSordi submits in support of his claim that Judge O'Brien attempted to prevent his counsel from "making a record" regarding the recusal motion - the exchange between counsel and Judge O'Brien at the February 1995, Hearing - is simply a judicial officer establishing reasonable parameters regarding oral advocacy in his courtroom. Moreover, the state court record established regarding the motion, including counsel's extensive written submissions, demonstrate that any claim that Judge O'Brien prevented counsel from creating a record was unsuccessful.

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[8] No evidence has been presented that DeSordi sought to have a later trial date, and that Judge O'Brien denied that request.

Judge O'Brien indicated at sentencing that DeSordi had "been silent" on the issues relating to what occurred on the night of the murder. Sentencing Tr. at 28. DeSordi argues that Judge O'Brien "improperly used petitioner's right to remain silent against him," Supporting Mem. at P. 44. and that this "hostility" on the part of Judge O'Brien demonstrated bias. Traverse at P. 5. However, a careful review of the sentencing transcript reveals that Judge O'Brien's comments were made after DeSordi's counsel indicated that David had provoked the fight. Sentencing Tr. at PP. 9-10. The comments about which DeSordi complains were merely Judge O'Brien's observations that there was scarce evidence which supported the claim that DeSordi acted in self-defense on the night of the murder.

Finally, while at times the conduct of Judge O'Brien might not have been a "model for fledgling judges," *Garcia v. Warden, Dannemora Correctional Facility*, 795 F.2d 5, 8 (2d Cir. 1986), DeSordi has failed to establish that Judge O'Brien was biased against DeSordi, not impartial, or that his rulings were the product of a deep-seated favoritism or antagonism. *Liteky*, 510 U.S. at 555; *In re Int'l Bus. Mach. Corp.*, 45 F.3d at 644.

Since DeSordi has not demonstrated bias on the part of Judge O'Brien or that there was an objectively reasonable basis for questioning his impartiality, the court recommends that this Ground in the petition be denied.

2. Marshaling of Evidence

DeSordi next argues that Judge O'Brien improperly marshaled the evidence before the jury in an "unbalanced manner." Supporting Mem. at P. 47. DeSordi continues that the court "presented the prosecutor's case as if there had been absolutely no conflict," and "compounded the errors it had made when it did not detail the facts supporting DeSordi's theories of defense and misled the jury that

DeSordi's sole claim was that he did not stab David or Peter Ebrest." *Id.* at P. 49.

To warrant the granting of federal habeas relief on this claim, DeSordi must establish that the marshaling of evidence was "'substantially significant and substantially adverse to the defendant.'" *Decan v. Edwards,* 1998 WL 813408, at *6 (E.D.N.Y. July 22, 1998) *[quoting Jenkins v.* Bara. 663 F.Supp. 891, 898 (E.D.N.Y. 1987)) *(other citation omitted).*

Although Judge O'Brien's summary of the prosecution's arguments was more lengthy than that given regarding the defense, a trial court need not give "equal time" to each side, especially where the prosecution has presented the majority of the evidence. *Johnson v. Scully,* 727 F.2d 222, 226-27 (2d Cir. 1984). Moreover, prior to marshaling the evidence. Judge O'Brien specifically cautioned the jury that:

> the mere fact that I mention this isn't to be taken by you or considered by you in any way, shape or form that I believe or think that this evidence has, in fact, been established or presented .... I want to make absolutely sure and certain that the simple fact that me, as the Judge in this case, is mentioning this that you don't think that simply because I've mentioned that, that it has, in fact. been established as evidence. Its up to you, ladies and gentlemen, to recall carefully all of the evidence to decide for yourselves whether the People have proven this evidence ... and if so, what inference may be drawn .... Please keep all of that in mind when you're in your deliberations and, of course, at this time when listening to my instructions.

Tr. at PP. 1494-95.[9] Where a trial judge gives curative instructions relating to the role of the jury in fact finding prior to marshaling evidence, habeas relief on such a claim is generally unavailable. *Pawfowskiv.* Ke//y. 932 F.Supp. 475, 482 (W.D.N.Y. 1995). Furthermore, Judge O'Brien later instructed the jury that "the defendant is entitled to every inference in his favor which can reasonably be drawn from the evidence. So where two inferences may be drawn from the same fact, one consistent with guilt and one consistent with innocence, the defendant is entitled to [the] inference which is consistent with his innocence." Tr. at PP. 1502-03.

DeSordi has not established that the cited portions of the charge, viewed "in the context of the overall charge," was unfair. See *Justice v. Hoke,* 45 F.3d 33. 34 (2d Cir. 1995) *(quoting Cupp v. Naughten,* 414 U.S. 141. 146-47 (1973)). Nor has he demonstrated that the manner in which Judge O'Brien marshaled the evidence adversely affect DeSordi in a significant and substantial manner, or denied him of a fair trial. Therefore, he is not entitled to relief on this Ground. See *McEachin v. Ross,* 951 F.Supp. 478, 484 (S.D.N.Y. 1997); *Pawlowski,* 932 F.Supp. at 482; *Beverty v. Walker,* 899 F.Supp. 900. 913 (N.D.N.Y. 1995) (Scullin, J.). *aff'd,* 118 F.3d 900 (2d Cir.), *cert. denied,* 522 U.S. 883 (1997).[10]

3. Prosecutorial Misconduct

DeSordi asserts that DA Cerio engaged in misconduct during summation. Specifically, DeSordi claims that the prosecution improperly commented on DeSordi's failure to testify on his own behalf, and asserted an

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[9] The jury is presumed to have followed these instructions. *Weeks v. Angelone,* 528 U.S. 225, 234 (2000); *Shariff v. Artuz,* 2001 WL 135763, at *3 (S.D.N.Y. Feb. 16, 2001) *(citations omitted).*

[10] Judge O'Brien acknowledged that he had misstated to the jury that DeSordi claimed that he did not stab either David or Peter. Tr. at P. 1554. However, defense counsel declined a curative instruction as to this issue. *Id.* at P. 1555.

argument in his summation that was not based upon any of the evidence. Supporting Mem. at P. 59.

A writ of habeas corpus will not issue on the basis of prosecutorial misconduct during summation unless such conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637. 643 (1974); *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). To prevail, DeSordi "must demonstrate that he suffered actual prejudice because the prosecutor's comments during summation had a substantial and injurious effect or influence in determining the jury's verdict." *Bentley v. Scully*, 41 F.3d 818, 824 (2d Cir. 1994). *cert. denied*, 516 U.S. 1152 (1996). Relevant factors in this determination include the severity of the prosecutor's conduct; the measures, if any, that the trial court took to remedy any prejudice; and the certainty of conviction absent the prosecutor's remarks. *Id.*; *Floyd v. Meachum*, 907 F.2d 347, 355 (2d Cir. 1990).

Moreover, since the *Donnelly* rule is "clearly established," see *Porter v. Kelly*, 2000 WL 1804545, at *4 (E.D.N.Y. Dec. 5, 2000); *Concepcion v. Portuondo*, 1999 WL 604951. at *4 (S.D.N.Y. Aug. 10, 1999), DeSordi can only prevail on his claim if he demonstrates that the Appellate Division's adjudication of this claim on appeal was contrary to, or involved an unreasonable application of, *Donnelly* and its progeny.

In his summation, DA Cerio stated:

> Folk's, there's three people, three people alone who have the intimate knowledge to tell you what happened here. Only three. One came before you and testified in this courtroom, having witnessed the murder of his brother. He came before you to this courtroom to testify as to what was ... a traumatizing event....

> One other person will never come before you. He's not here. He's dead. He can't tell you what happened. And one did come before you by way of videotape and written statement and didn't tell you the truth.

Tr. at PP. 1442-43.

DeSordi argues that this statement was an impermissible "indirect reference to the fact that petitioner had not testified at trial to defend himself," Supporting Mem. at P. 60.

"While it is axiomatic that the Government may not comment on a defendant's failure to testify at trial," *United States v. McDermott*, 918 F.2d 319, 327 (2d Cir. 1990), *cert. denied*, 500 U.S. 904 (1991), "[t]o reverse a conviction for improper commentary on the right to remain silent, [the court] must find that the comment was 'manifestly intended or [was] of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" *U.S. v. Gehl*, 1995 WL 54401. at *9 (N.D.N.Y. Feb. 2, 1995) (McCurn. S.J.) *(citing U.S. v. Pitre*, 960 F.2d 1112, 1124 (2d Cir. 1992)). *aff'd subnom. U.S. v. Tempotech Industries, Inc.*, 100 F.3d 941 (2d dr.), *cert. denied sub nom., Jackson v. U.S.*, 517 U.S. 1192 (1996). Furthermore, even if a petitioner succeeds in establishing such a constitutional violation, he cannot prevail unless he also establishes that the error was not harmless. *Bell v. Coughlin*, 778 F.Supp. 164. 176 (S.D.N.Y. 1991) *(citing Chapman v. California*, 386 U.S. 18, 22 (1967)).

The cited portion of the transcript does not support DeSordi's contention that DA Cerio impermissibly commented on DeSordi's failure to testify. Indeed. DA Cerio stated that DeSordi ***did*** testify - through his videotaped and written statements to the police (Tr. at P. 1443). DeSordi's statements had been admitted into evidence *(Id.* at PP. 948 and 1029), and DeSordi's trial counsel commented on them during his summation *(Id.* at PP. 1406-07). Thus. DA Cerio's

comments were fair commentary on the evidence adduced at trial and defense counsel's comments during his summation. *See Paul v. Kelly*, 1991 WL 49774, at *6 (E.D.N.Y. Mar. 26. 1991) *(citation omitted)*.

DeSordi argues that DA Cerio "improperly argued that the petitioner had 'sucker punched' the victim when there was absolutely no basis in the record for such argument." Supporting Mem. at P. 62.

In his closing argument, DA Cerio, in commenting about DeSordPs statement to David "[w]hy can't we just be friends," stated:

> I want you to think about it like this. You know what a sucker punch is? Ever hear of that? Yeah. I want to be friends. I didn't throw anything at your truck. And bang. That's when he goes after him. That's all it was, at best. At best. Blow your victims into a false sense of security.

Tr. at P.1450.

The jury was specifically instructed that summations by counsel were not evidence, but rather "merely arguments advanced by respective counsel telling you what they believe to be the conclusions that you should draw from the evidence." Tr. at P. 1471. Moreover, as the Appellate Division found, *DeSordi*, 238 A.D.2d at 740, this court finds that the comments were fairly inferable from the evidence and therefore, not a proper basis upon which to grant habeas relief. See *Smith v. Riley*, 1995 WL 1079778, at *9 (E.D.N.Y. Jan. 26, 1995).

Moreover, even assuming, *arguendo*, that DA Cerio's comments were improper, application of the three *Floyd* factors demonstrates that the comments did not render the trial fundamentally unfair. First, neither of the comments cited by DeSordi may properly be characterized as severe. These were two isolated statements in a summation that

comprised over thirty pages of the trial transcript, not a "studied pattern of improper remarks throughout" the summation. F/oycf, 907 F.2d at 355. Second, Judge O'Brien properly instructed the jury ***after*** summations that: (a) DeSordi's failure to testify was not a factor from which any unfavorable inference could be drawn (Tr. at P. 1477); and (b) arguments by counsel were not evidence upon which the jury's verdict could be based *[Id.)*. Third, in light of the evidence offered against DeSordi, DeSordi has failed to establish that his conviction would have been less certain absent the allegedly improper statements.

DeSordi has failed to demonstrate that the Appellate Division's finding that his claim of prosecutorial misconduct was without merit was contrary to, or involved an unreasonable application of, *Donnelly*. Therefore, the court recommends that this Ground in the petition be denied.

4. Insufficient Evidence

DeSordi argues that the jury's verdict was not supported by sufficient evidence and was against the weight of the evidence. Supporting Mem. at P. 66. The Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. See *Jackson v. Virginia*, 443 U.S. 307 (1979); *Fiore v. White*, 531 U.S. 225 (2001). The standard for reviewing claims of insufficient evidence asks "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319; *Wheel v. Robinson*, 34 F.3d 60. 66 (2d Cir. 1994). *cert. denied*, 514 U.S. 1066 (1995). Only when the record is totally devoid of evidentiary support is a due process issue raised and habeas corpus relief warranted. See *Bossett v. Walker*, 41 F.3d 825. 830 (2d Cir. 1994) *{citing Mapp v. Warden*, 531 F.2d

1167, 1173 (2d Cir. 1976)). The burden on a petitioner in such a claim is "very heavy." *Jamison v. Grier*, 2002 WL 100642. at *2 (S.D.N.Y. Jan. 25, 2002); *Ferguson v. Walker*, 2001 WL 869615, at *4 & n.4 (S.D.N.Y. Aug. 2, 2001). Moreover, "a conviction may be based upon circumstantial evidence and inferences based upon the evidence, and the jury is exclusively responsible for determining a witness' credibility." *United States v. Strauss*, 999 F.2d 692, 696 (2d Cir. 1993) *(citations omitted)*. Thus. the relevant inquiry is not whether a federal court sitting in habeas corpus could find the same facts to be true, but whether ***any reasonable fact finder*** could have arrived at the jury's finding.

Although no witnesses could testify to witnessing DeSordi stab either David or Peter, the evidence indicated that DeSordi had been known to carry a knife in his sock at all times. Tr. at PP. 764, 69-70. Moreover, the knife found at the scene of the crime "was identified as defendant's and no other individual involved had a weapon." *DeSordi*, 238 A.D.2d at 739. The knife was thrust into David's heart with a "good" amount of pressure, two to four inches deep, fatally wounding him. Tr. at PP. 1108, 1360. DeSordi then left David on the ground and stabbed Peter, causing his lung to partially collapse. Respondent's Appendix on Appeal ("R. App.") at P. RA8.[11] Furthermore, proof that a defendant fatally stabbed an individual supports a conviction of depraved indifference murder. *People v. Sawyer*, 274 A.D.2d 603, 606-07 (3rd Dep't 2000). *aff'd*, 96 N.Y.2d 815 (2001).[12]

To the extent DeSordi claims that his conduct was justified, he has failed to demonstrate that no reasonable fact-finder could have found that the prosecution proved that DeSordi's actions were not justified. Although David may well have verbally taunted DeSordi, the jury could

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[11] The wound to Peter was three to three and one half inches deep and was life threatening. *Id.* at P. 8-9.

[12] Furthermore, the stabbing by DeSordi of Peter clearly constituted an assault. *See People v. Brown*, 167 A.D.2d 847 (4th Dep't 1990).

reasonably conclude, based upon the evidence, that DeSordi's actions were not justified. For example, in sharp contrast to the injuries to David and Peter,[13] the only injuries received by DeSordi at the time of the murder were "a linear bruise along his right side of his face" and a "small laceration on the tip of the right small finger." Tr. at P. 1115. These injuries were treated by "washing his wounds, [applying] antibiotic ointment on the laceration and a band-aid or small dressing." R. App. at PP. RA30-31. Such minor injuries may have been considered by the jury in its decision to reject DeSordi's claim of self-defense. *Cf. Stengel v. Belcher*, 522 F.2d 438, 444 (6th Cir. 1975) ("minor injuries consisting of bruises and cuts received by [defendant] on his face which did not require hospitalization do not support his claim of self-defense").

Finally, viewing DeSordi's claim as one that alleges that his conviction was against the weight of the evidence, unlike review for sufficiency of the evidence, which is a federal due process issue, weight of the evidence review is a product of New York State statute and therefore, strictly a state law issue. See CPL § 470.15; see a/so, Peop/e *v. Bleakley*, 69 N.Y.2d 490 (1987). It is well-established that habeas corpus review is not available for errors under state law. *Estelle v. McGuire*, 502 U.S. 62, 67-69 (1991). As such, no cognizable federal issue is presented, and DeSordi is not entitled to habeas relief on such a theory. *Kearse v. Artuz*, 2000 WL 1253205, at *1 (S.D.N.Y. Sept. 5, 2000); Lopez *v. Smith*, 1993 WL 32740, at *1 n.1 (E.D.N.Y. Jan.20.1998). The Appellate Division rejected DeSordi's argument that the evidence at trial was insufficient to justify the verdict. *DeSordi*, 238 A.D.2dat739. DeSordi has not demonstrated that: (a) the Appellate Division's decision was either

[13] DeSordi's assertion that, on the night of the crimes, he "acted to avoid any risk of injury to all parties" (Supporting Mem. at P. 72) is contrary to virtually all of the evidence at trial.

contrary to, or an unreasonable application of, *Jackson*,[14] ;or (b) no rational trier of fact could have found DeSordi guilty of the elements of the crimes of which he was convicted beyond a reasonable doubt. Therefore, the court recommends that this Ground in the petition be denied. *Jackson*, 443 U.S. at 319; *Moore v. Irvin*, 908 F.Supp. 200, 204 (N.D.N.Y. 1995) (Koetl, J. sitting by designation).

5. Sentence

DeSordi argues that Judge O'Brien unconstitutionally imposed consecutive, rather than concurrent, sentences on DeSordi. Specifically, he alleges that since DeSordi's conduct was a "single extended transaction," the sentence was improper because more than one sentence was imposed for two offenses committed through a single act. Supporting Mem. at P. 83.

The Fifth Amendment's prohibition on Double Jeopardy protects persons from being punished twice for a single criminal offense. See U.S. Const. Amend. V.; *Brown v. Ohio*, 432 U.S. 161, 165 (1977). When a defendant has violated two separate criminal statutes, the protection against double jeopardy is implicated when both statutes prohibit the same offense or when one offense is a lesser included offense of the other. *Rutledge v. United States*, 517 U.S. 292, 297 (1996).

However, the Double Jeopardy clause does not prohibit a court from imposing separate punishments based on two criminal offenses, even when the offenses are premised on the same course of conduct. *Lyon v. Senkowski*, 109 F.Supp.2d 125. 141 (W.D.N.Y. 2000) *(citing Missouri v. Hunter*, 459 U.S. 359, 366 (1983).

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[14] The standards announced in *Jackson* are "clearly established." *Huber v. Schriver*, 140 F.Supp.2d 265, 276 & n.5 (E.D.N.Y. 2001).

DeSordi was found guilty of committing two different crimes -murder and assault - on two different individuals.[15] Since the stabbing of separate victims clearly constituted separate acts, the imposition of consecutive sentences was proper and DeSordi's Double Jeopardy claim is without merit. See e.g., *Moreno v. Kelly*, 1997 WL 109526, at *7 (S.D.N.Y. Mar. 11, 1997) (denying habeas petition challenging consecutive sentences. "New York Penal Law authorizes the imposition of consecutive sentences for multiple convictions where the offenses committed constitute separate and distinct acts."); *People v. Shabaz*, 173 A.D.2d 498. 500 (2nd Dep't 1991), *leave denied*, 79 N.Y.2d 923 (1992) (no overlap in the elements of conviction for crimes of depraved indifference murder as to one victim and assault as to other victim); *People v. Reyes*, 239 A.D.2d 524 (2nd Dep't 1997) (affirming consecutive sentences on the convictions for assault in the first degree and murder in the second degree, "each firing of the gun constituted a separate act"), *leave denied*, 90 N.Y.2d 909 (1997); *People v. Sumpter*, 203 A.D.2d 605, 605 (2nd Dep't) ("[t]he defendant fired two gunshots, with each bullet killing a separate victim. Although the shots were fired in rapid succession, and were part of the same transaction, the court did not improvidently exercise its discretion in imposing consecutive sentences since the defendant committed separate acts neither of which was a material element of the other"), *appeal denied*, 84 N.Y.2d 833 (1994); *People v. Williams*, 120 A.D.2d 630, 631 (2nd Dep't) ("[c]onsecutive sentences may be imposed for crimes committed by disparate and separate acts") *(citing* N.Y. Penal Law § 70.25(2)) *(other citation omitted), leave denied*, 68 N.Y.2d 761 (1986).

DeSordi also argues that he is entitled to habeas relief under the "rule of lenity," which provides that, "[i]n criminal prosecutions ... ambiguities in [a] statute [are] resolved in

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[15] In his traverse, DeSordi inexplicably claims that he was convicted of assault and ***robbery*** (Dkt. No. 17 at P. 22).

the defendant's favor." *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643. 649 (2d Cir. 1993). However, the rule of lenity applies only when, after consulting traditional canons of statutory construction, the court is left with an ambiguous statute. *United States v. Shabani*, 513 U.S. 10, 17 (1994); *United States v. Velasquez*, 199 F.3d 590. 593 (2d Cir. 1999). Neither the second degree murder statute (Penal Law § 125.25), nor the assault statute (*Id.* § 120.10 respectively) are ambiguous. Additionally, Penal Law § 70.25 which authorizes the imposition of consecutive sentences for distinct crimes, is unambiguous. Thus, the rule of lenity is inapplicable.

In light of the foregoing, the court recommends that this Ground in the petition be denied.

6. Ineffective Assistance

DeSordi's final Ground alleges that he received ineffective assistance of appellate counsel. He argues that counsel's performance was deficient because he:

> did not raise the issue of Petitioner's right to be present during an off-the-record, in chambers conference in which the trial judge disclosed his potential bias based on his or his family's acquaintanceship with the victim or the victim's family.

(Dkt. No. 12 at unnumbered P. 1).

On March 16, 1999, the Appellate Division denied DeSordi's application for a writ of *error coram nobis* alleging ineffective assistance of counsel. See attachment to Dkt. No. 10 ("March 1999, Order"). Thus, this court must determine whether the Appellate Division's decision was consistent

with the test articulated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 688-90, 694 (1984).[16]

In the context of a claim alleging ineffective assistance of appellate counsel, "'it is not sufficient for the habeas petitioner to show merely that counsel omitted a nonfrivolous argument, for counsel does not have a duty to advance every nonfrivolous argument that could be made.'" *Atkins v. Miller*, 18 F.Supp.2d 314, 320 (S.D.N.Y. 1998) *{quoting Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994)). Rather, to prevail upon such a claim, DeSordi must demonstrate that his appellate counsel "omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker." *dark v. Stinson*, 214 F.3d 315, 322 (2d Cir. 2000). *cert. denied*, 531 U.S. 1116 (2001).

Thus, appellate counsel cannot be considered ineffective for making a strategic decision to abandon weaker arguments and, instead, develop only those arguments more likely to succeed. *Kae v. Artuz*, 2000 WL 1738339. at *5 (E.D.N.Y. Nov. 21. 2000) *{citing Jones v. Barnes*, 463 U.S. 745, 753 (1983)) ("[a] brief that raises every colorable issue runs the risk of burying good arguments ... in a verbal mound of strong and weak contentions").

DeSordi's only claim in this Ground relates to a comment purportedly made by Judge O'Brien at a pretrial conference (Dkt. No. 12 at unnumbered P. 1). However, af^erthat conference, Judge O'Brien considered and denied the recusal motion, and specifically noted that he had "no relationship here with anybody in this case." February 1995, Hearing at P. 9.

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[16] Although the Appellate Division denied DeSordi's application for a writ of *coram nobis* without referring explicitly to the Sixth Amendment or relevant federal case law, it indicated that his "ineffective assistance of counsel claim" was "denied." *See* March 1999, Order. Since there is no basis for believing that the Appellate Division rejected the claim on non-substantive grounds, the adjudication was "on the merits," and therefore, such decision should be reviewed under the deferential standards prescribed in 28 U.S.C. § 2254(d)(1). *See Sellan*, 261 F.3d at 314.

DeSordi has not demonstrated how any argument based upon the alleged statement of Judge O'Brien in chambers which was inconsistent with his subsequent statement on the record, was more likely to succeed on appeal than those raised by appellate counsel. Moreover, this court has reviewed the appellate brief filed on DeSordi's behalf,[17] and finds that appellate counsel's strategy was both reasonable and sound. Under such circumstances, an ineffectiveness claim must fail. See e.g.. *Gonzalez v. Duncan*, 2001 WL 726985, at *6 (E.D.N.Y. June 22, 2001) (denying habeas claim alleging ineffective assistance of appellate counsel where appellate brief reveals sound appellate strategy on part of attorney); Daws *v. Keane*, 2001 WL 13288, at *6 (E.D.N.Y. Jan. 4, 2001) (same). Furthermore, DeSordi has not provided the court with evidence which indicates that significant and obvious issues could have been presented by his counsel on appeal, but were not.

Since DeSordi has failed to demonstrate that his appellate attorney's conduct was unreasonable, the court recommends that this Ground be denied. See *Pave! v. Hollins*, 261 F.3d 210. 216 (2d Cir. 2001) (habeas petitioner "must satisfy ***both*** prongs of the two-part test articulated in *Strickland*[11]) *(emphasis added); Price v. Senkowski*, 1996 WL 631731, at *3 (N.D.N.Y. Oct. 21. 1996) (Scullin. J.).

WHEREFORE, based upon the above, it is hereby

RECOMMENDED, that DeSordi's habeas petition be **DENIED** and **DISMISSED**; and it is further

ORDERED, that the Clerk serve a copy of this Order upon the parties by regular mail; and it is further

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[17] This brief asserts six points in support of the appeal, is seventy (70) pages in length, and accompanied by an Appendix in support thereof consisting of nearly seven hundred (700) pages.

ORDERED, that the state court records be returned directly to the Attorney General at the conclusion of these proceedings, who has agreed to make them available for any appellate review.

NOTICE: pursuant to 28 U.S.C. § 636(b)(1), the parties have **TEN (10) DAYS** within which to file written objections to the foregoing report-recommendation. Objections shall be filed with the clerk of the court. **FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir. 1993) *(citing Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir. 1989)); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e) and 72.

IT IS SO ORDERED.

Dated: March 7, 2002
Syracuse, New York

S/ Gary L. Sharpe
Gary L. Sharpe
U.S. Magistrate Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

VICTOR DISORDI, JR.,

Petitioner,

-against- 9:98-CV-1351 (LEK/GLS)

HANS WALKER, Superintendent, Auburn Correctional Facility,

Respondent.

APPEARANCES: OF COUNSEL:

FOR THE PLAINTIFF:
BIANCO LAW OFFICE RANDI JUDA BIANCO, Esq.
The Hogan Building
247 West Lafayette Street, Suite 202
Syracuse, New York 13202

FOR THE DEFENDANT:
HON. ELIOT SPITZER MARIA MORAN, Esq.
Attorney General of the Assistant Attorney General
State of New York
615 Erie Boulevard West, Suite 102
Syracuse, New York 13203-2455

LAWRENCE E. KAHN
U.S. District Judge

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DECISION AND ORDER

This matter comes before the Court following a Report-Recommendation filed on March 7, 2002 by the Honorable Gary L. Sharpe, United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b) and L.R. 72.3 of the Northern District of New York. After ten days from the service thereof, the Clerk has sent the entire file to the undersigned, including the objections by Petitioner, which were filed on March 26, 2002.

It is the duty of this Court to "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b). "A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." Id. This Court has considered the objections and has undertaken a de novo review of the record and has determined that the Report-Recommendation should be approved for the reasons stated therein.

The Court will briefly address Petitioner's objections to the Magistrate's Report and Recommendation. First, Petitioner asserts that he is entitled to habeas relief because the state court judge unduly restricted the time during which he could make a motion to recuse the trial judge. In support of this claims, Petitioner contends that he has proven that the state court judge was biased. The Court has reviewed the allegations and citations to the state court judge's comments made by Petitioner in his Memorandum of Law as well as in his objections to the Magistrate's Report, and finds that these allegations are insufficient to sustain a finding of bias. The state court judge never admitted to the relationship that Petitioner alleges caused the bias. There is also insufficient proof to establish the nature of the relationship alleged by Petitioner or the potential effect of such a relationship on the proceedings in the state court action. This lack of proof undermines Petitioner's

contention that even if the state court judge was not actually biased, there was an appearance of impartiality that could have been avoided by recusal. There is not enough evidence to support a finding that recusal should have been required to avoid an appearance of impartiality.

Petitioner next claims that he is entitled to habeas relief because the state court marshaled the evidence in an unfair and unbalanced matter. Petitioner attempts to distinguish Pawlowski v. Kelly, 932 F. Supp. 475 (W.D.N.Y. 1995), on which the Magistrate relied, from his own situation, noting that in Pawlowski the court summarized the defense's case in six pages, while in this action the defense's case was summarized in only 18 words. Despite any technical dissimilarity between Pawlowski and this action, Petitioner has still failed to establish how the charge in the state court action was unfair when viewed "in the context of the overall charge," not just when compared to other cases. Justice v. Hoke, 45 F.3d 33, 34 (2d Cir. 1995) (quotations omitted).

Finally, Petitioner contends that the prosecution's closing statements were improper and prejudiced the jury. While the Court agrees that some of the prosecution's statements do seem improper, the Court does not believe that these statements changed the outcome of the trial. Given the evidence established against Petitioner at trial, the Court finds that the resulting conviction was not a result of any unfairness in the trial caused by the prosecution's statements.

Accordingly, it is hereby

ORDERED that the Report-Recommendation is **APPROVED** and **ADOPTED** in its **ENTIRETY**; and

IT IS FURTHER ORDERED that the Petitioner's habeas petition is **DENIED** and **DISMISSED**; and

IT IS FURTHER ORDERED that the Clerk serve a copy of this order on all parties by regular mail.

IT IS SO ORDERED.

DATED: July 30, 2002
Albany, New York

S/ Lawrence E. Kahn

HONORABLE LAWRENCE E. KAHN
United States District Judge

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUD1CATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 12th day of January, two thousand and four.

Present: THOMAS J. MESKILL, ROSEMARY S. POOLER, SONIA SOTOMAYOR,
Circuit Judges.

VICTOR DeSORDI, JR.,
Petitioner-Appellant,

-v- (02-2560)

HANS WALKER, Superintendent, Auburn Correctional Facility,
Respondent-Appellee.

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Appearing for Appellant: Randi Juda Bianco, Bianco Law Offices, Syracuse, NY.

Appearing for Appellee: Evelyn M. Tenenbaum, Assistant Solicitor General, Office of the State Attorney General, (Eliot Spitzer, Attorney General of the Stale of New York, Robin A Forshaw, Assistant Solicitor General, *on the brief),* Albany, NY.

Appeal from the United States District Court for the Northern District of New York (Kahn, J.).

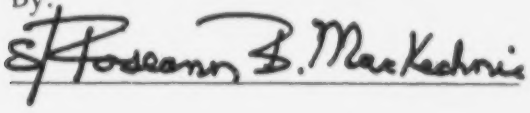
ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED.**

Petitioner Victor DeSordi. Jr., appeals from a judgment of the district court denying his petition for a writ of habeas corpus. We assume the reader's familiarity with the facts and underlying state and federal proceedings and hold as follows:

(1) In order to merit habeas relief on a claim of prosecutorial misconduct, petitioner must show that the alleged misconduct denied him a fair trial. Greer v. Miller, 483 U.S. 756, 765 (1987). He has failed to make this showing. Putting the prosecutor's remarks in context, as we must, see id_ at 765-66, we agree with the Appellate Division of the New York State Supreme Court that the remarks were fair commentary and characterization of the evidence submitted

at trial and defense counsel's comments during summation, see People v. Desordi, 238 A.D.2d 738, 740 (N.Y. App. Div. 1997).

(2) In order to prevail on a claim of judicial bias, the petitioner must show that he did not receive a trial "by an unbiased and impartial judge without a direct personal interest in the outcome of the hearing." Ungar v. Sarafite, 376 U.S. 575, 584 (1964). After examining those portions of the record that the petitioner claims evince bias, we conclude that he has not made the requisite showing.

We therefore affirm the judgment of the district court.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
By: